MOTION FILED

FEB 4 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-130

ROBERT J. QUINN, INDIVIDUALLY AND AS COMMISSIONER OF THE CHICAGO FIRE DEPARTMENT,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH JUDICIAL CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
and
BRIEF FOR THE ILLINOIS DIVISION OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

To The Honorable Chief Justice of Associate Justices of the Supreme Court of the United States:

The Illinois Division of the American Civil Liberties Union hereby respectfully moves for leave to file the attached brief *amicus curiae*. The consent of the attorney for the respondent has been obtained. The consent of the attorney for the petitioner was requested but refused.

The interest of the American Civil Liberties Union in this case arises from the fact that it is a nationwide, nonprofit organization representing over 350,000 members who share a belief in and concern for the ideas expressed in the Bill of Rights and other constitutional provisions affecting civil liberties. In par-

ticular, during its 56-year existence the ACLU has had a traditional interest in preserving the due process rights guaranteed by the Fifth and Fourteenth Amendments. The ACLU believes that fair procedures for all citizens must be constantly defended in order to protect the individual against arbitrary exercise of governmental power which is anathema to the maintenance of human dignity in a democracy.

The instant case presents a serious issue concerning procedural due process rights which are of vital concern to millions of state and local governmental employees. The Court of Appeals found that the concept of fundamental fairness mandated by the Fourteenth Amendment requires that such employees be given an opportunity for a hearing prior to suspension from their employment. The ACLU believes that this holding is correct and should be affirmed. The attached brief contains argument directed to certain aspects of this constitutional issue which have not and, it is believed, will not be contained in the briefs presented on behalf of respondent. If this argument is accepted, it would be dispositive of the case.

Accordingly, the granting of this motion and consideration of the attached brief *amicus curiae* are earnestly requested.

Respectfully submitted,

MICHAEL P. BUCKLO,
Attorney for Amicus Curiae.

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BRIEF FOR THE ILLINOIS DIVISION OF THE AMERICAN CIVIL LIBERTIES UNION AMICUS CURIAE.

QUESTIONS PRESENTED.

The argument in this brief will be directed solely to the following due process question and will not address the other issues upon which review was granted:

> Whether, in accordance with the due process command of the Fourteenth Amendment, a permanent public employee may be summarily suspended from his employment without pay for a period of 29 days, absent special circumstances, without prior notice of the charges against him and an opportunity for an appropriate prior hearing to dispute the grounds for those charges.

STATEMENT OF THE CASE.

Respondent Francis Muscare has been employed as a permanent civil servant with the Chicago Fire Department since 1955. During the course of his twenty-year employment as a firefighter, respondent has achieved the rank of lieutenant in the Department (A. 18, 129).

On the morning of February 27, 1974, three of Lt. Muscare's superiors appeared at his duty station and announced that he was being suspended and that he was immediately to turn in his equipment and badge (A. 19). At that time, Lt. Muscare was informed of neither the duration of his suspension nor the reason for its imposition, but only that he would later receive a letter explaining his offense and the nature of the punishment being imposed.

On March 4, 1974, the Department Chief of Personnel sent Lt. Muscare a letter stating that he had been suspended for a period of 29 days for alleged violations of § 51.133 (hair regulation), §61.001 (conduct unbecoming a member or employee) and § 61.006 (disobedience of orders) of the Rules and Regulations of the Chicago Fire Department (A. 11).

Lt. Muscare brought the present action in the United States District Court for the Northern District of Illinois on March 11, 1974, attacking both the constitutionality of these regulations and the summary suspension procedures employed which afforded him neither prior notice of the charges made against him nor an opportunity for any kind of prior hearing to dispute the grounds upon which these charges were based (A. 3-14).

The events leading to the suspension began in December 1973 when Lt. Muscare, along with the rest of his company, attended a class at the Chicago Fire Academy to obtain training in the use of self-contained breathing apparatus (A. 52). There an instructor advised that facial hair should not be worn with the breathing apparatus because it might prevent a proper

seal being obtained on the mask portion of the apparatus. Lt. Muscare disagreed with this advice and stated that firefighters in certain other large cities were allowed to wear long hair, beards and mustaches which were of no concern to their fire departments (A. 54, 56, 123). Furthermore, Lt. Muscare testified that during this course of instruction and in actual use he had experienced no difficulty in obtaining a proper seal with such masks (A. 127-129).

After class the instructor discussed the matter with the chief drillmaster and indicated that he did not know whether Lt. Muscare could obtain a good seal on his face mask while wearing a goatee (A. 71-73). Later that month, Lt. Muscare's superior officer told him to shave his goatee and that he was "working under charges" (A. 19). Lt. Muscare was not informed at that time of the specific nature of the "charges" against him or whether any disciplinary action would be taken with respect to them. Following this encounter, Lt. Muscare did not shave but continued to routinely work as a firefighter for a period of two and one-half months, during which nothing occurred concerning the matter until February 27, 1974, when he was suspended.

Furthermore, at no time during this period did the Acting Chief Fire Marshal with whom the "charges" had been lodged for determination of disciplinary action attempt to communicate with Lt. Muscare so as to provide him with an opportunity to explain or otherwise meet those charges (A. 111-112). In fact, the Acting Chief Fire Marshal conceded he was aware that a suspension for more than the 29-days imposed would have necessitated providing the prior hearing procedures required by the Illinois Municipal Code (A. 135-136).[1]

In addition, although Lt. Muscare was entitled upon request to a post-suspension hearing before the civil service

1. The Illinois Municipal Code provides that no officer or employee in the classified civil service "may be removed or discharged, or suspended for a period of more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense." Ill. Rev. Stat. ch. 24, § 10-1-18 (1973).

commission to contest the propriety of his suspension,[2] no reference to this right was made in the suspension letter he received (A. 11).

Following a hearing on Lt. Muscare's request for a preliminary injunction, the District Court ruled that the suspension was constitutional (A. 147-154). The Court of Appeals for the Seventh Circuit reversed on the ground that Lt. Muscare had been suspended without procedural due process in that no hearing was accorded him prior to his suspension (A. 159-168).

ARGUMENT.

A. The Employment Interests Involved in the Present Case Are Vitally Important.

Since the founding of this Nation, the concept of "property" as it applies to the life of the average American citizen has dramatically changed. The basically agrarian and private entrepreneur society existing at that time in which wealth was generally derived from ownership of land or enterprise has gradually been supplanted by a society dependent upon wages and various governmental benefits as its primary source of wealth.[3] Furthermore, by virtue of the fact that it employs more than one out of six workers, government has become directly responsible for the economic livelihood and well-being of a major portion of the civilian labor force and their families.[4] Even more significant to this case, since 1960 state and local government employment has nearly doubled from 6.4 million

2. Ill. Rev. Stat. ch. 24, § 10-1-18 (1973).

3. *Goldberg* v. *Kelly*, 397 U. S. 254, 262 n. 8 (1970). See also Reich, *The New Property*, 73 YALE L. J. 734 (1964).

4. In 1974, 85.9 million workers were in the total employed civilian labor force, of which 2.9 million were federal civilian employees and 11.8 million were state and local government employees. U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975, pp. 343 (Table 558), 243 (Table 405) and 272 (Table 440) respectively.

to 11.8 million employees,[5] whereas the civilian labor force has increased only about 30 percent.[6]

In response to this shift in the source of economic security to the government, those constitutional protections relating to "property", which guard the boundary between the private interests of the individual and the power of the state, have also enlarged to meet the legitimate expectations of our society.[7] For example, in recent years the due process guarantees of the Fifth and Fourteenth Amendments have been found to protect such non-traditional forms of wealth as welfare payments[8] and educational benefits for children.[9]

The present case therefore presents an important opportunity for this Court to provide guidance in an area critical to the economic well-being and security of a significant segment of our society. That is, what are the constitutional dimensions of the interest which millions of state and local governmental employees have in the uninterrupted continuation of their principal form of property—their jobs?

B. Respondent Has a Constitutionally Protected "Property" Interest in His Employment.

Recent decisions of this Court leave little doubt that Lt. Muscare has a constitutionally protected property interest in his employment with the Chicago Fire Department. According to Illinois law, a permanent public employee such as respondent may be discharged only upon a showing of "cause."[10] In *Arnett* v. *Kennedy*, 416 U. S. 134 (1974), six members of

5. *Id.* at 272 (Table 440).

6. An increase from 65.8 million employed workers in 1960 to 85.9 million employed workers in 1974. *Id.* at 343 (Table 558).

7. *Board of Regents* v. *Roth*, 408 U. S. 564, 577 (1972).

8. *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).

9. *Goss* v. *Lopez*, 419 U. S. 565 (1975).

10. Ill. Rev. Stat. ch. § 10-1-18 (1973).

this Court found that a federal employee who similarily could only be discharged for "cause" had "a legitimate claim of entitlement which constituted a 'property' interest under the Fifth Amendment."[11]

The fact that respondent was suspended, rather than discharged, has no bearing upon the threshold due process issue. In determining "whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents* v. *Roth*, 408 U. S. 564, 570-71 (1972). Here, the nature of respondent's interest in his employment extends to all but de minimus deprivations of that interest, including the 29-day suspension in question.[12] In *Goss* v. *Lopez*, 419 U. S. 565 (1975), this Court applied similar reasoning in holding that a 10-day suspension of high school students sufficiently affected the statutory property interest they had in a public education so as to bring into play the requirements of due process. Mr. Justice White, speaking for the majority in *Goss*, concluded:

> [T]he length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, "is not decisive of the basic right" to a hearing of some kind. *Fuentes* v. *Shevin*, 407 U. S. 67, 86, (1972). The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. (419 U. S. at 576.)

Hence, the only issue remaining is whether due process requires that a hearing be provided respondent prior to his suspension.

11. *Arnett* v. *Kennedy*, 416 U. S. at 166 (Powell, J., concurring).

12. Lt. Muscare's 29-day suspension cannot be viewed as de minimis in that, at the very least, it involved the loss of some $1,400.00 in pay [A. 165].

C. Based Upon the Circumstances of the Present Case, the Court of Appeals Was Correct in Concluding That Respondent Was Entitled to a Prior Hearing.

This Court has often invoked the basic principle that, at a minimum, due process guarantees "that deprivation of life, liberty or property by adjudication be *preceded* by notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950) (Emphasis added).[13]

At the outset, it is noted that no procedures of any kind were afforded respondent prior to his summary suspension. Although Lt. Muscare's Superior officer had indicated to him that he should shave his goatee and that he was "working under charges," respondent was never specifically informed of the nature of the charges against him or, most importantly, if any disciplinary action would be taken with respect to them.[14]

Granting that the application of due process guarantees is an "intensely practical" matter[15] which "negates any concept of inflexible procedures,"[16] this Court has uniformly held in cases involving the loss of wages that fundamental fairness requires notice and an opportunity for a hearing prior to suspension of the interest at stake.[17] The rationale underlying

13. The applicability of this rudimentary concept of procedural due process was recently reaffirmed by the Court in *Goss* v. *Lopez*, 419 U. S. at 579.

14. In fact, based upon the prior incidents involving his goatee where no disciplinary action had been imposed, Lt. Muscare would have no real reason to believe that he would be disciplined for his actions in the present case (A. 123-127).

15. *Goss* v. *Lopez*, 419 U. S. at 578.

16. *Cafeteria Workers* v. *McElroy*, 367 U. S. 886, 895 (1961).

17. *Arnett* v. *Kennedy*, 416 U. S. 134 (1974); *Perry* v. *Sindermann*, 408 U. S. 593 (1972); *North Georgia Finishing* v. *Di-Chem*, 419 U. S. 601, 611 n. 2 (1975) (Powell, J., concurring). In addition, a three-judge district court recently held in *Eley* v. *Morris*, 390 F. Supp. 913 (N. D. Ga. 1975), that in accordance with the dictates of *Arnett*, an opportunity to be heard prior to discharge must be afforded Georgia governmental workers.

these decisions is based, in part, upon the fact that wages constitute "a specialized type of property presenting distinct problems in our economic system." *Sniadach* v. *Family Finance Corp.*, 345 U. S. 337, 340 (1969).

Furthermore, the right to a prior hearing in cases that threaten the deprivation of wages comports with the underlying due process precepts of ensuring the accuracy of the fact finding process and of generating the feeling that the individual has been treated with the human dignity required of our democratic form of government. As Mr. Justice Frankfurter observed concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 171-72 (1951):

> No better instrument has been devised for *arriving at truth* than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for *generating the feeling*, so important to a popular government, *that justice has been done*. (Emphasis added.)

The latter purpose of "generating the feeling . . . that justice has been done" is particularly important in the case of a wage earner, such as respondent, who is placed in jeopardy of being cut off from the very source of his economic security. Since most public employees earn modest annual wages, any interruption of their current income is likely to cause immediate hardship by depriving them of the only means available for meeting day-to-day living expenses.[18] In such situations the opportunity for a prior hearing has traditionally been utilized to alleviate the feelings of humiliation, frustration and anguish which would surely otherwise accompany a sudden and summary deprivation by the State of these interests essential to the legitimate expectations and well-being of the individual.[19]

18. In 1974 the average pay of full-time federal civilian employees was $12,518 yearly. U. S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1975, p. 245 (Table 407).

19. See Surbin & Dykstra, *Notice and the Right to Be Heard: The Significance of Old Friends*, 9 Harv. Civ. Rights—Civ. Lib. L. Rev. 450, 452-57 (1974), for a complete analysis of the historical and psychological bases for due process rights.

Even if it appears that the facts are known and the law clear, prior procedural rights are no less necessary based upon these vital humanizing grounds.

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.[20]

In addition, such prior safeguards serve the practical purposes of providing the accused an opportunity to bring himself within one of the exceptions which accompany most legal rules, or to articulate the need for creation of a new exception, or to call to the attention of a remote decisionmaker facts in mitigation of the charges against him.[21]

It is submitted that the decision of the Court of Appeals finding that respondent, a twenty-year veteran of the civil service, was denied due process as a result of his summary and unexpected suspension is not only in accord with the previous rulings of this Court but is required by these basic principles underlying the Due Process Clause. Such rudimentary protection is essential to the concept of fundamental fairness mandated by the Fourteenth Amendment.

20. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. at 171 (Frankfurter, J., concurring).

21. The importance of providing additional due process protection when dealing with a "faceless" administrator, such as the Acting Chief Fire Marshal in the present case who made the decision to suspend respondent without ever seeing him, was noted by Mr. Justice Powell dissenting in *Goss* v. *Lopez*, 419 U. S. at 595 n. 13.

CONCLUSION.

For the reasons given, the *amicus curiae* believes that the holding below should be affirmed on the ground that respondent was denied due process.

Respectfully submitted,

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